(1)
Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WILLIAM JAMES NELSON,
Petitioner

V.

GARY JOHNSON, Director
Texas Department of Criminal Justice,
Institutional Division,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

Petition For Writ Of Certiorari

MELVIN GRAY
COUNSEL FOR PETITIONER
MELVIN GRAY & ASSOCIATES
206 WEST COLLEGE AVENUE
SAN ANGELO, TEXAS 76903
(915) 653-4594

398

QUESTIONS PRESENTED FOR REVIEW

1. Whether a clerical calendar posting error concerning a notice of appeal deadline, made by a staff member of a habeas petitioner's counsel is excusable neglect under FED. R. APP. P. 4(b)(4).

2. Whether the court below abused its discretion by failing to find excusable neglect and extend the time for filing a notice of appeal, or grant a certificate of appealability, respectively.

LIST OF PARTIES

Parties to the proceeding in the United States Court of Appeals For the Fifth Circuit are as follows:

William James Nelson
Neal Unit
9055 Spur 591
Amarillo, Texas 79107-9696
Petitioner-Appellant

Melvin Gray
206 W. College
San Angelo, Texas 76903
Counsel For Petitioner-Appellant

Gary L. Johnson, Director
Texas Department of Criminal
Justice, Institutional Division
P. O. Box 99
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Respondent-Appellee

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Assistant Attorney General
of Texas
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Counsel For Respondent -Appellee

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CITATIONS OF REPORTS

1. *Nelson v. Johnson*, Cause No. 6:99-CV-49-C, in the United States District Court, Northern District of Texas, Order Denying Leave to Extend Time, Honorable Sam Cummings, District Judge, dated October 25, 1999.

2. *Nelson v. Johnson*, No. 99-11321, (5th Cir. 2000) (Unpublished).

STATEMENT OF JURISDICTION

A judgment and order was entered by the United States Court of Appeals, Fifth Circuit, on the 11th day of April, 2000, affirming denial by the U.S. District Court, Northern District of Texas of Petitioner's Motion To Extend Time for filing notice of appeal.

No petition for rehearing was presented.

This Court has jurisdiction to review the judgment of the United States Court of Appeals pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

The specific statutory provision involved in this case is FED. R. APP. P. 4(b)(4), which provides as follows:

> "Upon a finding of excusable neglect or good cause, the district court may - before or after the time has expired, with or without motion and notice - extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

STATEMENT OF THE CASE

Petitioner seeks review of a denial of a Motion to Extend Time for Filing Notice of Appeal under FED. R. APP. P. 4(b)(4).

Petitioner filed a Writ of Habeas Corpus on May 13, 1999, in the U.S. District Court, Northern District of Texas. That court had jurisdiction pursuant to 28 U.S.C. § 2254. Petitioner sought post-conviction relief alleging ineffective assistance of counsel in his state-court trial and prosecutorial misconduct.

On August 24, 1999, Respondent's Motion to Dismiss asserting limitations was granted by the U.S. District Court, Northern District of Texas in Cause No. 6:99-CV-049-C. Petitioner's Motion for new Trial was overruled on September 16, 1999.

On October 21, 1999, thirty-five days after the Motion for New Trial was overruled, Petitioner filed a Motion for Extension of Time to File Notice of Appeal. The District Court denied the Motion to Extend Time, finding in its order that Petitioner failed to show excusable neglect or good cause. Appendix 13-15 and 12.

Petitioner filed a timely Notice of Appeal from the Order above-noted to the U.S. Court of Appeals for the Fifth Circuit, which had jurisdiction under 28 U.S.C. § 2253.

On April-11, 2000, the U.S. Court of Appeals for the Fifth Circuit found that Petitioner "had not made a credible showing the district court erred in finding no excusable neglect" and denied a certificate of appealability. Appendix 10-11.

This Petition for Writ of Certiorari is presented within 90 days of the Fifth Circuit Order.

ARGUMENT

1. *Whether a clerical calendar posting error concerning a notice of appeal deadline, made by a staff member of a habeas petitioner's counsel is excusable neglect under FED. R. APP. P. 4(b)(4).*

In his sworn Motion for Extension of Time, Petitioner's counsel stated that when the Order Dismissing Petitioner's Writ of Habeas Corpus was received, it was the intention of Petitioner's counsel to file a Notice of Appeal, and seek review at the Fifth Circuit. Appendix 13-15. It was further alleged by this sworn motion that as a result of a clerical error in calendaring, Petitioner's counsel believed the deadline for filing a Notice of Appeal was October 24, 1999, when in fact, the deadline was October 16, 1999. This calendar error was discovered on October 20, 1999, and the Notice of Appeal, along with a Motion to Extend Time was filed October 21, 1999, five days late. In the Motion to Reconsider Denial of Extension of Time, Petitioner's counsel attached and submitted to the District Court an affidavit of a legal assistant in his office explaining exactly how the calendar error occurred. Appendix 23.

In this case, Petitioner believes that the United States Court of Appeals for the Fifth Circuit, decided an important federal question in a way which conflicts with relevant decisions of this Court.

In 1993, this Court handed down a decision on late filing. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 113 S.Ct. 1489 (1993). This case involved a question of construing the term "excusable neglect" under the FED. R. BANKR. P., 9006(b)(1). In *Pioneer*, this Court held that the rule authorizing a bankruptcy court to accept late filings for failure to do an act as a result of excusable neglect

contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness, as well as by intervening circumstances beyond a party's control. *Id.* Whether neglect is excusable, this Court held, is at bottom, an equitable decision which should take into account all of the relevant circumstances surrounding the party's omission, including the length of delay, its potential impact on judicial proceedings, and the reasons for the delay. *Id.* This was in the context of the bankruptcy rules of procedure.

Then in 1996, the question before this Court was whether the holding in *Pioneer* was applicable to the then existing version of FED. R. APP. P. 4, in the criminal context. *Stutson v. United States*, 116 S.Ct. 600 (1996). This Court noted at the time that it was the unanimous view of six courts of appeal that the *Pioneer* standard applied to Rule 4 cases. *Id.* It seemed also that the Fifth Circuit agreed with this application of Rule 4. *Cf.*,*United States v. Clark*, 51 F.3d 42 (5th Cir. 1995).

This Court noted that a contrary approach would risk effectively immunizing summary dispositions by courts of appeal from review. This Court went on to say,

> finally it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interest in judicial efficiency in finality must occasionally be accommodated.

Stutson, 116 S. Ct. at 603

Petitioner would show this Court that in a situation where a litigant desires to appeal an adverse ruling and where a clerical calendar posting error

concerning a Notice of Appeal deadline is made by a staff member of a counsel's office, such a set of circumstances presents excusable neglect. Petitioner would submit that the phrase "excusable neglect" contemplates that human errors may occur through inadvertence, mistake or carelessness. Where there is an absence of conscious indifference, common sense and equity should prevail.

The flexibility of FED. R. APP. P. 4(b)(4) was recognized by the Fifth Circuit, where a defense counsel misinterpreted the applicable rule. *United States v. Clark*, 51 F.3d 42 (5th Cir. 1995). *Clark* was remanded to the district court for reconsideration under the proper standard, which the court noted was more subtle than dramatic. *Id.*

Yet, before and even after this Court's opinion in *Pioneer Investment Services*, and *Stutson* there has been a wide range of often harsh and inconsistent application of the Rule 4 provision concerning "excusable neglect," which this Court said was ultimately an equitable determination.

In a related case, a secretarial error that resulted in placement of the wrong cause number on a notice of appeal was found to be excusable neglect. *Marshall v. Hope Garcia Lancarte*, 632 F.2d 1196 (5th Cir. 1980). However, a notice of appeal mistakenly sent to a state court, so that its arrival at the federal district court was one day late, was not excusable neglect. *See, State of Oregon v. Champion International Corporation*, 680 F.2d 1300 (9th Cir. 1982). Both of these pre-*Pioneer* cases involved legitimate clerical or secretarial error and lacked any indicia of conscious indifference.

Still, in 1998, the notion of applying equity to human error was absent where a lawyer miscalendared an expiration date for filing an appeal because allowance of such a mistake "would prejudice the

judicial administration of justice." *D and D Family Preservation Trust v. United States*, 2 F. Supp 2d 1320, 1322 (D. Oregon, 1998).

Petitioner submits that the Fifth Circuit, in its opinion below, improperly relied on its own misplaced post-*Pioneer* precedent which involved misconstruction of a rule. *See, Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998) Petitioner submits there is a need for this Court to provide guidance in this area with a workable rule in which the relevant equitable inquiry includes whether the mistake (neglect) was a result of conscious indifference, or good faith human error. Such a rule would serve to protect the rights of litigants without undue prejudice to the administration of justice.

2. *Whether the court below abused its discretion by failing to find excusable neglect and extend the time for filing a notice of appeal, or grant a certificate of appealability, respectively.*

The facts presented to the District Court and made apparent to the Court of Appeals below clearly demonstrated, both in the initial Motion for Extension of Time and by way of a supplemental affidavit, that failure of Petitioner's counsel to file a Notice of Appeal in a timely manner was due entirely to a human mistake, a clerical error. The Motion to File an Extension of Time and the Notice of Appeal were presented to the District Court a mere five days late. There would have been no prejudicial impact on the judicial proceedings to have allowed this to go forward. Petitioner was incarcerated. The clerical error giving rise to the late notice of filing in this case closely resembled that which gave rise to the Fifth Circuit

opinion where the wrong docket number was inadvertently placed on the notice of appeal. *See, Marshall v. Lancarte*, 632 F2d 1196 (5th Cir. 1980). All of the equitable factors noted in *Stutson* are present in this case.

For these reasons, Petitioner urges this Court to hold that the Fifth Circuit and the District Court for the Northern District of Texas, abused their discretion by failing to find excusable neglect and extend the time for filing a notice of appeal, remand this case to the Fifth Circuit with instructions to grant a certificate of appealability so that Petitioner may be heard to complain of the action of the District Court granting a dismissal of his habeas petition for limitations.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Court issue a Writ of Certiorari, allow further briefing if it deems same to be necessary, and reverse the decision of the Fifth Circuit below.

Respectfully submitted,
MELVIN GRAY & ASSOCIATES
206 West College Avenue
San Angelo, Texas 76903
(915) 653-4594
(915) 657-0039 FAX

By: Melvin Gray
MELVIN GRAY
State Bar No. 08328000

U.S. Court of Appeals Filed Apr 11 2000 Charles R. Fulbruge III Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11321
USDC NO. 6:99-CV-49-C

WILLIAM JAMES NELSON,

Petition-Appellant,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

William James Nelson, a Texas prisoner represented by counsel, seeks a certificate of appealabilty (COA) to appeal the district court's denial of his motions to extend the time to appeal and for a new trial regarding that denial. Nelson has not made a credible showing that the district court erred in finding no excusable neglect. See Halicki v. Louisiana Casino Cruises, Inc., 151 F. 3d 465, 468-69 (5th Cir. 1998), cert. denied, 119 S. Ct. 1143 (1999). Accordingly, his motion for a COA is DENIED. See Sonnier v. Johnson, 161 F.3d 941, 943 (5th Cir. 1998).

Nelson did not timely notice his appeal from the dismissal of his 28 U.S.C. § 2254 petition, and the district court denied his motion to extend the time for filing his notice of appeal. Thus, this court lacks jurisdiction over any appeal from the final order dismissing Nelson's § 2254 petition. See United States v. Merrifield, 764 F.2d 436, 437 (5th Cir. 1985).

COA DENIED.

s/ E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

U.S. District Court Northern District of Texas Filed Oct 25 1999 Nancy Doherty, Clerk By s/MR Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

WILLIAM JAMES NELSON,
Petitioner,
V.

CIVIL ACTION NO.
6:99-CV-049-C

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

ORDER

The Court has considered the Petitioner's Motion for Extension of Time for filing a notice of appeal and finds that Petitioner has failed to show excusable neglect or good cause. Therefore, Petitioner's request for an extension is denied.

SO ORDERED.

Dated October 25, 1999.

s/Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

U.S. District Court Northern District of Texas filed Nov 4 1999 Nancy Doherty, Clerk By s/ MR Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

WILLIAM JAMES NELSON,
Petitioner,

V.

CIVIL ACTION NO.
6:99-CV-049-C

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

ORDER

The Court has considered the Petitioner's "Motion to Reconsider Denial of Extension and Supplemental Affidavit," wherein Petitioner asks this Court to reconsider its Order denying an extension of time for filing a notice of appeal. Petitioner's motion is denied.

SO ORDERED
Dated November 4, 1999.

s/Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

U.S. District Court Northern District of Texas filed Oct 21 1999 Nancy Doherty, Clerk By s/ __ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

WILLIAM JAMES NELSON,
Petitioner

vs **No. 6:99-CV-49-C**

GARY JOHNSON, DIRECTOR,
INSTITUTIONAL DIVISION
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE
Respondent

MOTION FOR EXTENSION OF TIME

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, WILLIAM JAMES NELSON, Petitioner herein, by and through his undersigned counsel of record, filing this Motion For Extension Of Time, in which to file Notice of Appeal, in accordance with Rule 4, Federal Rules of Appellate Procedure, and in support of same would respectfully show as follows:

Rule 4(a)(5), Federal Rules of Appellate Procedure, provides that a District Court may extend the time to file a Notice of Appeal if a party so moves no later than 30 days after the time prescribed by Rule 4 expires, and if that party shows excusable neglect or good cause.

Petitioner would show through his undersigned counsel that it has been his desire and intention to file a Notice of Appeal and make Application for Certificate

Appealability since receiving the Order of this Court dated September 16, 1999, and in connection with same engaged in research regarding the requirements to file an Application for Certificate of Appealability.

By clerical error in calendaring, counsel believed the deadline for filing a Notice Of Appeal was October 24, 1999, that is we in fact believed that the Order overruling Motion For New Trial had been entered on September 24, 1999.

This error was discovered on October 20, 1999, and immediately upon its discovery counsel prepared this Notice of Appeal and the instant motion.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays the Court extend the time for filing Notice of Appeal from October 16, 1999, until October 21, 1999.

Respectfully submitted,

MELVIN GRAY & ASSOCIATES
206 West College Avenue
San Angelo, Texas 76903
(915) 653-4594
(915) 657-0039 FAX

By: s/ Melvin Gray
MELVIN GRAY
State Bar No. 08328000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed by Certified Mail to Charles Palmer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on October 21, 1999.

s/ Melvin Gray
MELVIN GRAY
Attorney for Petitioner

VERIFICATION

I, MELVIN GRAY, Attorney herein, certify that I have read the above and foregoing Motion For Extension of Time and state under oath that same is true and correct.

s/ Melvin Gray
MELVIN GRAY

STATE OF TEXAS §
COUNTY OF TOM GREEN §

SIGNED under oath before me on 10/21, 1999.
s/ Sally Castleberry
Notary Public, State of Texas
Notary Public State of Texas Sally Castleberry My Commission Expires February 26, 2000

CERTIFICATE OF CONFERENCE

This will certify that I attempted a conference with Charles Palmer, Assistant Attorney General, telephone 512/936-1400 at 4:15 p.m. on October 21, 1999, as regards the attached Motion For Extension of Time. Mr. Palmer was not in his office and I left a message on his voice mail.

s/ Melvin Gray
MELVIN GRAY

U.S. District Court Northern District of Texas Filed Nov 2 1999 Nancy Doherty, Clerk By s/ ____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

WILLIAM JAMES NELSON,
Petitioner

vs **No. 6:99-CV-49-C**

GARY JOHNSON, DIRECTOR,
INSTITUTIONAL DIVISION
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE
Respondent

MOTION TO RECONSIDER DENIAL OF EXTENSION AND SUPPLEMENTAL AFFIDAVIT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, WILLIAM JAMES NELSON, Petitioner herein, by and through his undersigned counsel of record, filing this Motion To Reconsider this Court's Denial of Petitioner's Motion For Extension of Time in Which to File Notice of Appeal, and in support of same would respectfully show as follows:

On October 21, 1999, Petitioner filed a Motion For Extension of Time in which to file Notice of Appeal, and presented on that date his Notice of Appeal to this Court showing his desire to appeal an Order overruling his Motion For New Trial.

The Order overruling Petitioner's Motion For New Trial was entered on September 16, 1999. Rule 4,

Federal Rules of Appellate Procedure, provides that a Notice of Appeal in civil cases must be filed 30 days after the judgment or order appealed from is entered. In the instant case, however, the 30th day following September 16, 1999, this being October 16, 1999, fell on a Saturday, and therefore, in accordance with Rule 26(a)(3) Federal Rules of Appellate Procedure, the deadline for filing the Notice of Appeal was Monday, October 18, 1999.

Petitioner's Notice of Appeal was filed then 3 days late along with a Motion For Extension of Time.

This Court in its Order dated October 25, 1999, entered a finding that Petitioner failed to show excusable neglect or good cause. This Court retains jurisdiction over the instant case and may reverse its Order as long as it does so within 30 days from October 16, 1999.

It is the finding of this Court that Petitioner failed to show excusable neglect or good cause that Petitioner wishes this Court to reconsider.

In Petitioner's Motion For Extension of Time, it was alleged that a clerical error in calendaring led counsel to believe the deadline for filing Notice of Appeal was October 24, 1999. This Motion For Extension of Time further indicated that since reeeipt of the Order denying the Motion For New Trial it had been Petitioner's intention to file a Notice of Appeal and make Application for Certificate of Appealability.

Attached as Exhibit "A" is the Affidavit of a Legal Assistant employed by Melvin Gray & Associates which sets forth in more detail the manner in which the calendaring error occurred.

Petitioner submits that the calendaring error which resulted in the late filing was in effect a good faith human error, and as such, should be held to show excusable neglect.

There is some history in the Northern District of Texas of overly strict construction of Rule 4(a)(5) Federal Rules of Appellate Procedure which has not always been approved by the United States Court of Appeals for the Fifth Circuit.

By way of example, in *Marshall v. Lancarte*, 485 F.Supp. 251 (N.D. Tex. 1980) the Honorable Eldon B. Mahon held that a clerical error which resulted in the filing of a Notice of Appeal bearing an incorrect docket number was not "excusable neglect," under Rule 4(a), and in that case denied a Motion For Extension of Time filed by the Secretary of Labor of United States Department of Labor. That Court's opinion made reference to a First Circuit opinion in *Airline Pilots In Service Of Executive Airlines, Inc. v. Executive Airlines, Inc.*, 569 F.2nd, 1174(1st Cir. 1978). The *Airline Pilots* case involved inadvertence or mistake of a secretary in the employee of Plaintiff's attorney and wherein the secretary through inadvertence or mistake calendared the date upon which the appeal expired incorrectly. A human error exactly the same as appears in the instant case before this Court.

In reviewing Judge Mahon's decision, the 5th Circuit in *Marshall v. Lancarte*, 632 F.2nd, 1196 (5th Cir. 1980), stated that the inadvertent placing of the wrong docket number on the Secretary of Labor's Notice of Appeal was, "clearly a case where 'excusable neglect' was shown" and concluded that the District Court should have granted the Motion For An Extension of Time in which to file Notice of Appeal. *Marshall, supra*, 632 F.2d, at 1197.

Strict construction of the term excusable neglect is part of the history of federal jurisprudence which created perhaps an unduly harsh reality of rule application. Still, the Fifth Circuit began to realize in 1979 that a modification of Rule 4(a)(5), Federal Rules

of Appellate Procedure, served as an indicator that flexibility was intended in the granting of extensions. *Chipser v. Kohlmeyer & Company*, 600 F.2d 1061 (5th Cir. 1979).

Finally, in 1993 and 1999, the Supreme Court infused common sense and equity into the determination of whether neglect is excusable, by its opinions handed down in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 113 S.Ct. 1489; and *Stutson v. United States*, 116 S.Ct. 600 (1996).

Pioneer, supra, involved a question of construing the term excusable neglect under Federal Rules of Bankruptcy Procedure, Rule 9006b(1). In *Pioneer*, the Supreme Court held that the rule authorizing a Bankruptcy Court to accept late filings or failure to act as the result of "excusable neglect," contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond a party's control.

The Supreme Court in Pioneer went on to say that the determination of whether neglect is excusable, and warrants allowing of a late filing, is at bottom an equitable one, taking into account all of the relevant circumstances surrounding the parties omission, including length of delay and its potential impact on judicial proceedings, and the reason for the delay.

In *Stutson vs. United States*, 116 S.Ct. 600 (1996), the Supreme Court acknowledged and endorsed the agreement of both parties to that proceeding that the rule announced in *Pioneer Investment Services Company*, applies to Rule 4, Federal Rules of Appellate Procedure. The Supreme Court in that case also noted the facts before it included proper consideration of the fact that the Petitioner was in jail, was serving a prison

sentence of 292 months, and had no Appellate review of his legal arguments against conviction and sentence. The opinion went on to say, "finally it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive powers of the government in the form of imprisonment, our legal traditions reflect a certain solitude for his rights, to which the important public interest in judicial efficiency and finality must occasionally be accommodated." 116 S.Ct. et. 603.

In summary then, the Motion To Extend Time previously filed with this Court revealed the uncontroverted fact that a clerical error in calendaring the deadline for filing the Notice of Appeal resulted in the Notice of Appeal in this case being filed 3 days late. This was a good faith human error, much like that which was found wanting 20 years ago in *Airline Pilots Association, supra*, but which today has been seen and should be seen as constituting excusable neglect.

The Affidavit attached demonstrates these facts even more clearly.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays the Court reverse its Order of October 25, 1999, denying the Extension Of Time in which to file Notice Of Appeal, and enter an Order granting the Extension of Time in which to file Notice Of Appeal, accept the Notice Of Appeal previously filed and further that the Certificate Of Appealability previously presented to this Court be Granted.

Respectfully submitted,

MELVIN GRAY & ASSOCIATES
206 West College Avenue
San Angelo, Texas 76903
(915) 653-4594
(915) 657-0039 FAX

By: s/ Melvin Gray
MELVIN GRAY
State Bar No. 08328000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed by Certified Mail to Charles Palmer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on November 2, 1999.

s/ Melvin Gray
MELVIN GRAY
Attorney for Petitioner

CERTIFICATE OF CONFERENCE

This will certify that I attempted to conference with Charles Palmer, Assistant Attorney General, telephone 512/936-1400, at 3:08 p.m. on November 2, 1999, as regards, the attached Motion To Reconsider Extension of Time. Mr. Palmer was not in his office and I left a message on his voice mail.

s/ Melvin Gray
MELVIN GRAY

STATE OF TEXAS)(

)(**AFFIDAVIT**

COUNTY OF TOM GREEN)(

Before me, the undersigned authority, personally appeared Steven L. Woolard who, being duly sworn upon his oath, deposed and said as follows:

My name is Steven L. Woolard. I am 45 years old, of sound mind, and have personal knowledge of the facts stated below.

I am employed as a legal assistant at the offices of Melvin Gray and Associates. My duties include legal research and preliminary drafting of motions, briefs and correspondence. I possess a Juris Doctorate degree.

Around September 20, 1999 Mr. Gray gave me the order of the Court overruling Motion For New Trial in Cause No. 6:99-CV-049-C, *Nelson v. Johnson*, and asked me to prepare for him a preliminary draft of a Notice of Appeal and Application For Certificate of Appealability. I immediately consulted Rule 4, Federal Rules of Appellate Procedure and noted we had 30 days to file. I also noted there was a requirement under Section 2253, Title 28 United States Code that a petitioner obtain a certificate of appealability and made note to research the form requirements of such a motion later in the week.

On Friday, September 24, 1999 I performed enough research on the Section 2253 requirements to be able to compose a preliminary draft and it was at this time that I recalled the need to calendar our deadline for filing. With the 30 day rule in my mind, I penned on my calendar October 22, 1999 as the deadline, thinking this would be in reality 3 days early. I told Mr. Gray I would present him a draft in advance of the deadline. On October 20, 1999 I picked up the Nelson file to prepare drafts of the Notice of Appeal and

Application for Certificate of Appealability and reviewed the Court's order overruling Motion For New Trial. It was at this time I discovered my calendering error.

Further Affiant sayeth not.

s/ Steven L. Woolard
Steven L. Woolard

Subscribed and sworn to before me this 2nd day of November 1999.

s/ Sally Castleberry
Notary Public, State of Texas

Notary Public, State of Texas Sally Castleberry My Commission Expires February 26, 2000